United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by:
David N. Sexton

Docket No. 74-1977

IN THE

United States Court of Appeals

For the Second Circuit

SELENE WEISE,

Appellant,

—*v*—

SYRACUSE UNIVERSITY, et al.,

Appellees.

On Appeal from the United States District Court
Northern District of New York

BRIEF FOR APPELLEES,
Syracuse University, et al.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

Cases

Cases — Page

Statutes

Statutes

Rules

Miscellaneous

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STATEMENT OF THE ISSUES

1. Is there sufficient State involvement in faculty appointment procedures at Syracuse University to confer standing upon a federal court under 28 U.S.C. §1343(3) and (4)?

2. Are the 1972 amendments to the Civil Rights Act of 1964 (42 U.S.C. §2000e et. seq.) retroactive as to acts completed prior to the effective date of the Act?

3. Is appellant a proper class representative?

STATEMENT OF THE CASE

Selene Weise brought an action in Federal Court on September 18, 1973 against Syracuse University, administrators of Syracuse University and individual faculty members of the Department of Speech Communication alleging discrimination based on sex and claiming jurisdiction under the Fourteenth Amendment to the United States Constitution; the Civil Rights Act of 1871 (42 U.S.C. ¶1983 and 1985); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et. seq.) and Executive Order 11246, as amended by Executive Order 11375.

Additionally, appellant requested that her action be maintained as a class action "on behalf of herself and on behalf of all other women who, because of their sex, and solely because of their sex, have been, are being, and will continue to be denied access to, and promotions in faculty positions at Syracuse University in contravention of the United States Constitution and the various acts of Congress which prohibit discrimination based on sex".

On motion of the appllees, the District Court dismissed the complaint on various jurisdictional grounds and determined that the class action was not appropriate.

POINT I

(a) NO JURISDICTION EXISTS UNDER 28 U.S.C. §1343 (3) and (4) BASED UPON THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION OR 42 U.S.C. SECTION 1983 (THE CIVIL RIGHTS ACT OF 1871).

It is clear from the case law that jurisdiction under both the Fourteenth Amendment and 42 U.S.C. Section 1983 must be based upon state action. Monroe v. Pape, 365 U.S. 167 (1961); United States v. Price, 383 U.S. 787 (1966). Private activities, such as those of Syracuse University, can be held to involve state activity only if the acts can be viewed as governmental in nature, see Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968); or if the state government is directly involved in the activity in question; see Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

Appellant has attempted to allege state action at Syracuse University by the bare and conclusory statements in Paragraphs 51, 52 and 53 of the complaint alleging federal and state funding of programming at Syracuse University and alleging the regulation and supervision of Syracuse University by various state agencies. These allegations do not justify a finding of state action.

Federal support or control is not relevant to claims brought under the Fourteenth Amendment or under 42 U.S.C. Section 1983 since each concerns state, not federal, action; see Grossner v. Trustees of Columbia University, 287 F. Supp. 535, 547 (S.D.N.Y. 1968) ("the jurisdiction upon which plaintiff's call is available for state, not federal action"); Ward v. St. Anthony's Hospital, 476 F.2d 671 (10th Cir. 1973); Blackburn v. Fisk University, 443 F.2d 121, 123 (6th Cir. 1971); and Norton v. McShane, 332 F.2d 855, 862 (5th Cir. 1964); cert. denied, 380 U.S. 981.

Nor is state funding alone sufficient to constitute state action. The affidavit of Clifford Winters makes it clear that the state funds provided Syracuse University constitute a minute percentage of the school's budget (3.6% in fiscal year 1973) and can in no way justify a finding of state action. In Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968) the Court found that state aid to Alfred College through scholarships and funding of its Ceramic College was far from being so dominant as to afford any basis for a contention that this state financing resulted in state activity. More recently, in Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973), this Court reiterated that position: "...the mere making of an outright grant amounting to a fraction of the actual cost of conferring a degree does

not suffice to make the school the agent of the state". Id. at 1142. See also Grossner v. Trustees of Columbia University, supra, in which the court recognized that state funding alone does not constitute state action:

> Receipt of money from the state is not, without a good deal more, enough to make the recipient an agent or instrumentality of the government. Otherwise, all kinds of contractors and enterprises, increasingly dependent upon government business for much larger proportions of income than those here in question, would find themselves with 'state action' in the performance of all kinds of functions we still consider and treat as essentially 'private' for all presently relevant purposes.
> Id. at 547-548.

Appellant's third allegation, that Syracuse University is regulated and supervised by various state agencies, also fails to prove state action. Syracuse University is a private non-profit institution. Its actions in faculty hiring and the awarding of teaching assistantships (the issues involved in this case) are not governmental in nature nor is the government directly involved in these activities. The Second Circuit in Powe v. Miles, supra, recognized this distinction stating:

> The state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action must be the subject of the complaint. [citations omitted]...but the fact that New York has exercised some regulatory powers over

> the standard of education offered by Alfred University does not implicate it generally in Alfred's policies towards demonstrations and discipline. Id. at 81. (emphasis added)

This rule was aptly demonstrated in Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970) where the state, through legislation, potentially involved itself with campus disruptions, the subject matter of the suit. The court recognized that these specific controls may have resulted in state involvement in specific areas of discipline and remanded the matter for a further hearing by the district court. It is clear that it is only with those particular activities subject to state control that state action may be found. See Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) and Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973). See also Shirley v. State National Bank, 493 F.2d 739 (2d Cir. 1974) and Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974)("[T]here, we find no state action since there is no significant involvement of the state in the challenged conduct.") (emphasis added).

In Grafton v. Brooklyn Law School, supra, at 1141, the Second Circuit reaffirmed its position stated in Powe v. Miles, supra, that the mere regulation of educational standards by the State of New York does not in itself constitute state action. Further, in Grafton, supra, the Court distinguished

its holding in Coleman v. Wagner, supra, and made it clear that the regulation of law schools by the New York Court of Appeals does not result in state action. The Court recognized that "Brooklyn Law School's giving of examinations has none of the symbolic character of the disciplinary rules and regulations of Wagner College which loudly announced that they had been adopted in accordance with the newly enacted statute". Id. at 1143. See Moose Lodge v. Irvis, 407 U.S. 163 (1973); and Pendrell v. Chatham College, 370 F. Supp. 494 (W.D.Pa. 1974).

Thus, the critical question concerning state action in a private institution is, what control does the state have over the subject matter of the action? In this case which concerns a private university's faculty hiring and granting of teaching assistantships, there is and can be no showing of state control. The state simply does not regulate these areas. Recently, in Furumoto v. Lyman, 362 F. Supp. 1267 (N.D.Cal. 1973) the Court found no state action at Stanford University stating:

> A finding of general state action here would require more than an accumulation of the state benefits or regulations cited by plaintiff. These factors do not establish state control or the inherently governmental nature of the university. Plaintiffs have not demonstrated that Stanford is controlled by the State of California or that Stanford does not have a substantial sphere of private, independent authority and initiative.

> The state's grant to Stanford of corporate powers and privileges is not evidence of state control. The state has thus merely given Stanford substantially the same corporate powers and privileges given to any corporation formed under its laws... Even if the state directly subsidizes the university, this financial aid would not necessitate a finding of state control. The question would then be what control did the state obtain over the university. Here the record is barren as to any control.
> Id. at 1278-1279.

See also Brownley v. Gettysburg College, 338 F. Supp. 725 (M.D. Pa. 1972); Blackburn v. Fisk University, 443 F.2d 121 (6th Cir. 1971), and Pendrell v. Chatham College, supra.

Two courts have found state action in the activities of private universities; Belk v. Chancellor of Washington University, 336 F. Supp. 45 (E. D. Mo. 1970) and Guillroy v. Administrators of Tulane University, 203 F. Supp. 855 (E. D. La. 1962). Both decisions, however, have been criticized by other courts and are of questionable authority. In Pendrell v. Chatham College, supra, the court distinguished both cases on their facts and rejected both "on the basis of their inapposite reasoning". And, in Furumoto v. Lyman, supra, the court distinguished both Guillroy, supra, and Belk, supra, and stated at 1277n22:

> The authoritativeness of the Guilroy decision relied upon by plaintiff is questionable in light of its later history. The summary judgment in that case was subsequently set aside, the temporary injunction vacated, and a new trial granted.

> These actions were upheld on appeal, 306 F.2d 489 (5th Cir. 1962). After a trial, the district court found that state action was lacking, but that no court could enforce any racial restrictions in private covenants and thus that the Tulane Board was free of those restrictions. 212 F. Supp. 674 (E. D. La. 1962)

It is clear from the allegations in the complaint and the affidavits submitted by appellant and the appellees that no state action under the Fourteenth Amendment or under 42 U.S.C. Section 1983 exists.

There is no need for hearing in the case at hand. Recently, the Third Circuit did reverse a district court's decision and ordered that a hearing be held concerning the the existence of state action at the University of Pittsburgh, Braden v. University of Pittsburgh, 477 F.2d 1 (3rd Cir. 1973). In Braden, the State of Pennsylvania had the power to appoint at least one-third of the University of Pittsburgh's trustees, and a Pennsylvania Statute referred to the University of Pittsburgh as an "instrumentality of the Commonwealth". 477 F.2d at 6, 7. The Braden decision was based upon the unique structure of the University of Pittsburgh and its holding is not applicable to the issues before this Court.

In any event, the decision of the Third Circuit does not affect the position of the Second Court of Appeals. The Second Circuit in Grafton v. Brooklyn Law School, 478

F.2d 1137 (2d Cir. 1973) upheld a district court's determination of no state action based upon facts present in the complaint and in affidavits. In Furumoto v. Lyman, 302 F. Supp. 1267 (N. D. Cal. 1 ,3), summary judgment was granted defendants based upon motion papers alone. The district court had before it the three basic allegations of state action made by plaintiff and defendants response to them. No further relevant information would be gained through hearings. The Second Circuit's position on state action has been clearly stated in Powe v. Miles and Grafton v. Brooklyn Law School, supra, and this matter was properly determined by the court without a hearing.

Appellant argues that the courts are more willing to find state action in cases dealing with racial discrimination and that such rulings are applicable to the case at hand involving alleged discrimination based upon sex. No indicia of state action exists at Syracuse University which would justify the Court's finding of state action even if racial discrimination were involved. More importantly, however, plaintiff is incorrect in her attempt to equate racial and sexual discrimination. This has been recognized by the Reverend Theodore M. Hesburgh, President of the University of Notre Dame and former head of the United States Commission on Civil Rights, who stated:

> It is an illusion to equate the problems of blacks and Chicanos with those of women. If and when women put their minds and efforts seriously to the solution of the inequalities that exist between themselves and men, they will make rapid progress in righting the wrongs, as is now beginning to happen.
>
> Not so, for the deep-rooted inequities that blacks-men and more especially women-suffer. The color problem is far more difficult of solution, far more influenced by deep-rooted prejudice than the problems of gender. (Emphasis added) P. 6, Chronicle of Higher Education, Oct. 23, 1973.

(b) THE STATUTE OF LIMITATIONS BARS MANY PARTS OF PLAINTIFF'S CAUSE OF ACTION.

Even if this Court should find jurisdiction under the Fourteenth Amendment to the United States Constitution or 42 U.S.C. Sections 1983 (the Civil Rights Act of 1871), many of the claims made by appellant are barred by the statute of limitations.

The Fourteenth Amendment and the Civil Rights Act of 1871 do not provide a specific statute of limitations. The federal courts must, therefore, look to the most nearly similar period of limitation provided by New York State, and apply that statute of limitation.

In Civil Rights actions such as this, federal courts in New York have applied N.Y.C.P.L.R. ¶214(2) which imposes a three year statute of limitation. See Beyer v.

Werner, 299 F. Supp. 967 (E.D.N.Y. 1969) and Swan v. Board of Higher Education, 319 F.2d 56 (2d Cir. 1963). This point was clearly stated in Romer v. Leary, 425 F.2d 186 (2d Cir. 1970) in which the court stated:

> It is now settled by Swan v. Board of Higher Education (citation omitted) that in a suit seeking declaratory and injunctive relief which is based on the Civil Rights Act, 42 U.S.C. Section 1983, the applicable limitation in a case arising in New York is the three year limitation now provided for suits "to recover upon a liability...created or imposed by statute" by what is now CPLR Section 214, Subd. 2. Id. at 187.

Nor should the filing of charges with the New York State Division of Human Rights or the Equal Employment Opportunity Commission toll the statute of limitations. In Johnson v. Railway Express Agency, Inc., 489 F.2d 525 (6th Cir. 1973) cert. granted 94 S.Ct. 2639, the Court held that the mere filing of charges with the EEOC is not sufficient to toll the period of limitations for claims under 42 U.S.C. §1981. Further, in Jenkins v. General Motors Corp., 354 F. Supp. 1040 (D. Del. 1973), the Court relied on the reasoning in Young v. International Tel. and Tel. Co., 438 F.2d 757 (3rd Cir. 1971), and held that separate and concurrent actions brought under Section 1981 and Title VII of the Civil Rights Act of 1964 would not frustrate the Congressional policy underlying Title VII and accordingly the district court found that it was not appropriate to toll the statute of limitations.

Similarly, appellant was never precluded from instituting a federal court action under 42 U.S.C. §1983 or the Fourteenth Amendment, and could conceivably achieve different remedies under these Sections from those available under the New York State Human Rights Law and Title VII of the Civil Rights Act of 1964. Consequently, there is no justification for tolling the statute of limitations in this case and issues arising prior to September 18, 1970 are barred by the statute.

POINT II

THE 1972 AMENDMENTS TO THE CIVIL RIGHTS ACT OF 1964 CONCERNING EDUCATIONAL INSTITUTIONS ARE NOT RETROACTIVE.

Appellant alleged in her complaint many acts which occurred and were completed prior to March 24, 1972, the effective date of the 1972 amendments to Title VII. These amendments made educational institutions subject to the Act for the first time for its employment in educational positions (42 U.S.C. §2000e-1). Those acts which occurred prior to the effective date of the amendment may not be allowed as a basis for a Title VII action. Various courts have divided concerning the retroactivity of the 1972 amendments of Title VII that apply to the Federal Government with some finding

that the Act is not retroactive while others found it only retroactive as to proceedings already pending at the effective date of the amendment, March 24, 1972. Compare Place v. Weinberger, 497 F.2d 412 (6th Cir. 1974) with Koger v. Ball, 497 F.2d 702 (4th Cir. 1974); and Womack v. Lynn, ____ F.2d ____, No. 72-1827, (D.C. Cir. 1974). Retroactivity is applicable in such cases only under the statutory construction of 42 U.S.C. §2000e-16(c), covering only federal employees, which provides that:

> (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred eighty days from the filing of the initial charge with the department, agency or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in Section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant. (emphasis added).

The courts finding retroactivity have held only that charges properly pending before governmental agencies at the time of the 1972 amendments could properly proceed in federal court under the provisions of Title VII. The general

rationale upon which this position is based is well stated in Vymetalik v. Secretary of Commerce, ____ F. Supp. ___, No. 2211-72 (D.D.C. 1974) in which the court analyzed all previous decisions on retroactivity and concluded:

> Even those Courts which have found jurisdiction over claims arising or filed administratively prior to March 24, 1972, however, have limited their holdings on retroactivity to matters which were pending administratively on that date. [*] No Court has found unlimited retroactive application of jurisdiction, and there are sound policy reasons for this. To have long since "closed" complaints of discrimination, such as the thirteen-year old matter herein, rise Lazarus-like from the dead to a place on federal court dockets would subject the federal court system to a potential deluge of cases of ripe age, each subject to possible de novo review.

In contrast to the administrative procedures and filing requirements for federal employees under 42 U.S.C. §2000e-16(c), an educational employee in an educational institution had prior to the 1972 amendments no federal administrative agency before which it could process a civil rights grievance. In addition, unlike charges by a federal employee, charges by educational employees of educational institutions are subject to the filing requirements of 42 U.S.C. §2000e-5. 42 U.S.C. §2000e-5 provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against

> whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency. (emphasis added).

This section clearly requires that charges be filed with the Equal Employment Opportunity Commission at the earlier of the various time limits specified. At the latest, this would require that the appellant file a claim with the Equal Employment Opportunity Commission within three hundred days of the alleged unlawful employment practice. Appellant Weise alleges that she was denied employment on September 3, 1969, more then 2 years prior to the filing of her charges with the EEOC. This filing was not timely and the 1972 amendment in no way cures this defect. In Gordon v. Baker Protective Services, Inc., 358 F. Supp. 867, 868 (N.D. Ill. 1973) the court dismissed an action which had not been timely filed with the EEOC stating:

> The statutory period for filing a complaint with the EEOC...is a jurisdictional prerequisite to any subsequent action. The statutory period for filing constitutes, in effect, a limitation by Congress on the right to proceed before the EEOC are in a subsequent suit in a district court.

See also Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972).

In Johnson v. University of Pittsburgh, 359 F. Supp. 1002 (W.D. Pa. 1973), the court considered but did not directly decide this issue since the plaintiff was still employed at the effective date of the 1972 act. The court found jurisdiction because the plaintiff was still employed at the time the amendments were made effective. In the case at hand, alleged acts which were completed prior to the effective date of the amendment cannot be covered by an action brought under Title VII.

POINT III

SELENE WEISE IS NOT A PROPER REPRESENTATIVE OF THE CLASS SHE CLAIMS TO REPRESENT.

Selene Weise asks to represent the class of:

> "...all other women who, because of their sex, and solely because of their sex, have been, are being, and will continue to be denied access to and promotions in faculty positions at Syracuse University in contravention of the United States Constitution and the various acts of Congress which prohibit discrimination based on sex."

Title VII complaints which attempt to qualify as class actions must satisfy the requirements of Rule 23(a). Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir.

1968). The burden of satisfying the requirements of Rule 23 fails on those who seek to maintain a class action. Kinzler v. New York Stock Exchange, 53 F.R.D. 75 (S.D.N.Y. 1971); Cannon v. Texas Gulf Sulfur Co., 53 F.R.D. 216 (S.D.N.Y. 1971). A mere repetition of the language of Rule 23, as appellant has done in her complaint, has been held to be inadequate to establish a class action proceeding. One must present a sufficient statement of facts to indicate that each requirement of Rule 23(a) is satisfied as well as one of the requirements of Rule 23(b). Banks v. Lockheed-Georgia Co., 46 F.R.D. 442 (N.D. Ga. 1968); Contract Buyers League v. F. & F. Investment, 48 F.R.D. 7 (N.D. Ill. 1969).

Selene Weise will not "fairly and adequately represent the interests of the class", thus failing to meet the requirement of Rule 23(a) (4). Appellant alleges that she was denied employment in the Department of Public Address in September, 1969 - more than four years ago. Such a lengthy absence is a significant obstacle to her being fully aware of the employment practices affecting present and future applicants for faculty positions. See Hyatt v. United Aircraft Corp., 50 F.R.D. 242 (D.C. Conn. 1970), in which the court held that individuals discharged more than 2 years earlier could not maintain an action on behalf of persons previously employed, presently employed or to be

employed in the future, where they could not be aware of current problems, and were in no position to adequately protect the interests of the entire class.

As an applicant for a position in one Department of the University, appellant cannot be a proper representative of faculty women across the entire university, in contravention of Rule 23(a) (2), that there are questions of law or fact common to the class, and (a) (3) that the claims or defenses of the representative parties are typical of the claims or defenses of the class. This conclusion necessarily flows from the fact that decisions on hiring, firing, promotion, and tenure are predominantly made at the departmental level. University manpower needs in terms of faculty are based upon student enrollment in courses in various departments rather than aggregate student enrollment across the entire university. Legitimately striving toward efficiency, the university must allocate faculty according to demand, such demand measured by particular course enrollment. Decisions regarding hiring, firing, promotion, and tenure, however, weighted by merit and deed, cannot be realistically and practically divorced from such allocation considerations.

Selene Weise also alleges that she was improperly denied a position as a Teaching Assistant in the Department of Speech Communication for the 1973-74 school year. A

teaching assistant is a teaching position held by graduate students, but one which is not a part of the full time faculty. Thus, this allegation does not address itself to the hiring or promotion practices of either the Department or the University, and cannot as a class action properly address such areas.

The qualifications of faculty members and teaching assistants of the Department of Speech Communication are unique to that department, just as they are unique for the Chemistry Department, Economics Department, History Department, etc. Faculty members and teaching assistants cannot transfer from one department to another without acquiring the requisite knowledge, skills, and credentials to teach in the other department.

In O'Connell v. Teachers College, ____ F. Supp. ___, 73 Civ. 4299 (S.D.N.Y. 1974) the Court denied plaintiff's request for a class action stating:

> I conclude, as already stated, that any claims for alleged sex discrimination against Columbia Teachers College would necessarily involve trials of the individual issues regarding the particular employment or promotion problem. Class action treatment is not practicable or desirable, whether the matter is considered under subdivision (b)(3) of Rule 23 (the provision for class actions where common issues predominate over individual issues), or subdivision (b)(2) (the provision for injunctive relief where the party opposing the class has acted "on grounds generally applicable to the class").

Plaintiff was never a member of the full time faculty and was rejected as an applicant in only one department of the University. She has not shown that her claim is typical of the claims of the class she seeks to represent, a class which encompasses all departments of the university and which purports to cover not only hiring but also promotions. See Johnson v. Lillie Rubin Affiliates, Inc., ____ F. Supp. ___, No. 5943 (M. D. Tenn. 1973), in which the court found that Rules 23(a) (3) and (a) (4) were not met where a discharged employee failed to establish that she belonged to the class of all blacks who were denied employment in any capacity solely because of their race. The court made this determination from the fact that the plaintiff was only qualified for the position of stockgirl and, therefore, could only protect the interests of stockgirls.

See also Kinsey v. Legg, Mason & Co., 60 F.R.D. 91 (D.D.C. 1973). Plaintiff Kinsey, rejected for a job of securities salesman, was not permitted to maintain a class action against defendant brokerage house on behalf of all black applicants for retail securities sales positions, as well as, institutional sales positions, and non-sales positions, since the record revealed diverse considerations with respect to qualifications, salaries, and duties of retail securities salesmen and non-sales personnel.

> "The divergent factors and qualifications considered by Legg, Mason in its decision whether or not to hire an applicant for a position as a retail securities salesman, institutional salesman or in a non-sales capacity, precludes plaintiff herein from representing an ill-defined class that would encompass prospective employees of all job classifications. See Bradley v. Southern Pacific Co., Inc., 51 F.R.D. 14, (S.D. Tex. 1970). The bald assertion that there are members of a class who share the same or similar grievances as plaintiff does not comply with the "typicality' requirement of Rule 23(a) (3)."
> Id. at 100.

The court concluded that the plaintiff had satisfied Rule 23(a) (3) only to the limited extent that his claims might be typical of a class of blacks allegedly refused jobs as retail securities salesmen because of their race.

Finally, see Calhoun v. Riverside Research Institute, ____ F. Supp. ___, 71 Civ. 2734 (S.D.N.Y. 1972), in which the court ruled that a black professional employee allegedly denied promotion on racial grounds, could not maintain a class action on behalf of all black employees, professionals, as well as, non-professionals, in that non-professional employees were not qualified for consideration for promotion to professional positions and, thus, the typicality requirement was not fulfilled.

A teaching assistantship is not a regular faculty position. Dr. Ray Irwin states in his Affidavit that: "A teaching assistant is not considered a member of the full

time faculty." However, let us narrow this question to its more pertinent aspect: Does a teaching assistant share a sufficient professional community of interest with full-time faculty members so as to be able to fairly and adequately represent the latter in a class action such as the one here proposed? The Court might look to the labor relations field for some guidance on this contested issue.

In a speech before the Second Annual Conference sponsored by the National Center for the Study of Collective Bargaining in Higher Education, at Baruch College, City University of New York, on April 8, 1974, NLRB Member Ralph E. Kennedy stated:

> "To date, the Board has excluded teaching assistants from faculty units on the theory that they are primarily students, and since their teaching functions supplement their academic program, they do not really share an overall community of interest with the faculty. In Adelphi University, for example, a Board panel concluded that teaching assistants should not be included in the faculty unit. The record established that they did not have faculty rank and did not participate in faculty meetings. Their employment was contingent upon continued student status, they were not eligible for tenure, and they did not share in university-sponsored fringe benefits, save insurance." [Adelphi University, 195 NLRB 639 (1972) 85 LRR 295.

The importance of the tenure distinction was highlighted in New York University, 205 NLRB No. 16 (1973), in which the Board excluded from a faculty unit all adjunct

professors and part-time faculty members not employed in "tenure track" positions.

Appellant has not shown the class to be so numerous that the joinder of all members is impracticable, especially when the scope of her class is limited to applicants for the position of Teaching Assistant in the Speech Communication Department. Thus, she does not meet the requirement of Rule 23 (a) (1).

CONCLUSION

FOR THE FOREGOING REASONS, THE ORDER OF THE DISTRICT COURT DISMISSING THE COMPLAINT SHOULD BE AFFIRMED.

Respectfully submitted,

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RE: SELENE WEISE v. SYRACUSE UNIVERSITY, et al. (Docket No. 74-1977)

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

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~~[Appendix]~~ of the above-entitled case addressed to:

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